IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.454 OF 1990

1. Ramesh Sadashiv Khatpe
2. Satish Pandharinath Dhole ... Appellants

V/s.

The State of Maharashtra ... Respondent

a/w
CRIMINAL APPEAL NO.491 OF 1990

Tejendra @ Teja Nathuram Kondhare ... Appellant

V/s.

The State of Maharashtra ... Respondent

a/w
CRIMINAL APPEAL NO.531 OF 1990

Vijay Shankar Shelar ... Appellant

V/s.

The State of Maharashtra ... Respondent

a/w
CRIMINAL APPEAL NO.580 OF 1990

The State of Maharashtra ... Appellant

V/s.

1. Vijay Shankar Shelar
2. Tejendra @ Teja Nathuram Kondhare
3. Ramesh Sadashiv Khatpe
4. Satish Pandharinath Dhole ... Respondent s

and
CRIMINAL APPEAL NO.581 OF 1990

The State of Maharashtra ... Appellant

V/s.

1. Vijay Shankar Shelar
2. Tejendra @ Teja Nathuram Kondhare
3. Ramesh Sadashiv Khatpe
4. Satish Pandharinath Dhole ... Respondent s

Mr.B.R. Patil for Appellants in Appeal No.454 of 1990\

Mr.Shirish Gupte for Appellant in Appeal No.491 of 1990

Mr.N.Deshpande for Appellant in Appeal NO.531 of 1990

Mr.A.S. Shitole, APP for State in all Appeals

CORAM: D.G. DESHPANDE &
SMT.NISHITA MHATRE, JJ.

DATED: MAY 4, 2007

JUDGMENT (PER SMT.MHATRE, J.)

These appeals are directed against the judgment and order of the Sessions Court in Sessions Case NO.196 of 1989 and Sessions Case No.254 of 1989. Accused No.1 has filed Appeal No.531 of 1990, accused No.2 has filed Appeal No.491 of 1990 and Accused Nos.3 and 4 have filed the Appeal No.454 of 1990. All the accused have been convicted under section 394 r/w 34 of the Indian Penal Code and sentenced to suffer R.I. for 3 years and payment of fine of Rs.3,000/-. They are further convicted for the offence punishable under section 304 part II r/w 34 IPC and sentenced to undergo R.I. for

one year and payment of fine. Besides this, the accused are convicted for the offence punishable under section 120B IPC. Accused Nos.1 and 3 have been convicted for the offence punishable under section 323 r/w 34 IPC and sentenced to payment of fine of Rs.100/- each and in default to undergo R.I. for seven days. Appeal No.580 of 1990 has been filed by the State and is an appeal against the acquittal of the accused under section 302 IPC. Appeal NO.581 of 1990 is also preferred by the State for enhancement of the sentence imposed on accused No.2. Since all the appeals have impugned the same judgment, we have heard them together.

2. The case of the prosecution is that the accused No.2 was to appear for his SSC examination and because he was not sure of securing good marks, he decided to achieve the desired results by having a dummy appear for him at the examination. He was told that this would cost about Rs.10,000/-. After some negotiations, accused No.2 settled for paying Rs.6,500/- for procuring a dummy who would appear for him at the examinations. In order to obtain this amount, accused No.2 with the help of the other accused decided to rob one Jagdishprasad Agarwal whom they knew carried a huge amount every Friday night from Pune to Karnataka. Jagdishprasad Agarwal used to hire a particular rickshaw evey Friday from his shop where he sold milk products, go to Pune station with cash and and leave for Karnataka. He would return to Pune with the raw material required for his business. Since accused No.2 knew of Jagdishprasad Agarwal's routine on Friday night, the accused intercepted the auto rickshaw in which he was travelling to Pune station and tried snatching the bag in which he was carrying the cash. When Jagdishprasad resisted, accused No.2 assaulted him with a sword. The other

accused assaulted the rickshaw driver, snatched the bag and fled from the scene of offence. Jagdishprasad got out of the rickshaw holding the left side of his chest where he had been stabbed and collapsed on the road. However, he asked the rickshaw driver to chase the accused who had fled in another auto rickshaw which was standing nearby. Since the rickshaw driver was unable to catch the assailants, he returned to the spot where Jagdishprasad was lying, after informing the family of Jagdishprasad. The victim was removed to hospital where he was declared dead before admission. The accused were arrested and charged for offences punishable under sections 120B, 394, 302, 323 r/w 34 of the IPC. The trial was committed to the Sessions Court, Pune. The Additional Sessions Judge convicted the accused as aforesaid under sections 394, 304 part II r/w 34 of IPC and under section 120B of IPC while acquitting them under section 302 of IPC. While sentencing the accused, the Sessions Court took into account the age of the accused who were then all in their early twenties.

3. Mr.Gupte, learned Counsel appearing for accused No.2, urged that the prosecution case against the accused was false and and that the rickshaw driver who was the eye witness, PW4, could not have identified the accused when the incident occurred within two minutes according to the witness. He points out that the scene of offence was located about 45' away from an electric pole. The light emitted by it was shaded by a Gulmohur tree. PW4 would therefore not be able to see the assailants clearly, remember their faces and then identify them at the Test Identification Parade held about 4 months later when the incident occurred within two minutes, urges the learned Counsel. He also submits that the story of the prosecution is improbable inasmuch as PW4 claims to have

chased the assailants who were in another rickshaw for a distance of over 10 kms, without informing the police when admittedly there were about 5 to 6 police stations enroute. According to the learned Counsel the recovery of the sword at the instance of accused No.2, which has been proved by PW9, cannot be believed as the recovery has been made about 15 days later after the incident from an open field. The learned Counsel then submits that if at all we agree with the findings of the Sessions Judge that the accused No.2 is guilty, a lenient view should be taken while sentencing them. He points out that the accused were all young boys in their early 20s when the incident occured. Accused No.2 had undergone imprisonment for almost two years during the trial and thereafter till he was released on bail pursuant to the order of this Court. He submits that during this period of almost 18years, accused No.2 has settled in lifeand is runninga business. He is married and has children. Uprooting him at this stage in his life would mean untold misery for his family and for accused No.2. He submits that the fine may be increased and the imprisonment already undergone should be a sufficient sentence, especially since the accused No.2 has not been involved in any criminal activity either before or after the aforesaid incident.

4. Mr.B.R. Patil, learned Advocate for accused Nos.3 & 4 and Mr.Deshpande, learned Advocate for accused No.1, have essentially adopted the same submissions as made by Mr.Gupte. Accused Nos.1, 3 and 4 were also in their early 20s when the incident occurred and, therefore, they submit that the jail term which the accused have already undergone would be sufficient in the facts and circumstances of the case.

5. On the other hand, the learned APP has submitted that there was a conspiracy between the accused to rob Jagdishprasad in order make it feasible for accused No.2 to appear at the SSC examination through a dummy.. He points out that the motive for committing the crime has been established by the prosecution and has been accepted by the Sessions Court. The learned APP submitted that the victim had died because he was assaulted on the vital parts of his body. He urges that accused No.2 had inflicted blows with a sword on the victim Jagdishprasad while committing robbery while Accused Nos.1,3 and 4 had assaulted PW4. These acts of the accused have been proved by the prosecution, according to him. The learned APP submits that acquitting the accused or reducing the sentence would amount to a travesty of justice.

6. With the assistance of the learned Counsel appearing for the accused and the learned APP, we have scrutinised the entire evidence on record. We have perused the judgment impugned in these appeals. The learned Sessions Judge has marshalled the facts ably and has drawn proper inferences while convicting the accused under sections 394 and 304 Part II r/w section 34 of IPC and section 120B of the IPC. We agree with the finding of the learned Sessions Judge that no case has been made out by the prosecution for convicting the accused under section 302 r/w 34 of the IPC.

7. The entire case is based on the testimony of the sole eye witness PW4. He is a rickshaw driver who used to transport Jagdishprasad to Pune station from his shop on every Friday. Jagdishprasad had been his passenger on the same route for about 5 to 6 years prior to the incident and, therefore, PW4 was well acquainted with Jagdishprasad

and his movements. The testimony of this witness is absolutely natural and there are no contradictions, omissions or discrepancies or improvements in his deposition. He has withstood the searching cross-examination conducted on behalf of the accused and, therefore, the evidence of PW-4 is credible and believable.

8. The recovery of the sword at the instance of accused No.2 has been proved. it was found to be blood stained. The bag of Jagdishprasad has been fished out of the canal at the instance of accused No.3. Blood stained clothes of the accused have also been recovered. The accused have been identified by PW-4 at the test identification parade. The prosecution has thus proved the role played by each of the accused in committing the robbery.

9. The prosecution had relied on an extra-judicial confession allegedly by accused no.2 to PW15. However, the Sessions Court has rightly disbelieved this extra-judicial confession but has believed the statement by PW15 that accused no.2 had received an amount of Rs.6,000/- as his share of the loot.

10. After scanning the evidence on record, we find that the accused have been convicted under sections 394, 304 Part II r/w 34 and section 120 B of the I.P.C.

11. Though the Trial Court has acquitted the accused from offence under 302 of the I.P.C. and has convicted them under Section 304 Part II read with 34 and we are maintaining that conviction, we are not in agreement with the findings of the Trial

Court in Para 31 wherein the Trial Court has observed as under:-

> "Thus, I find that the accused persons were intending to rob Jagdishparsad and with that intention they had rushed towards Jagdishprasad and everything was happened in such quick moment that it is possible that Dilip Darawade could not have seen which of the accused out of Nos. 2 and 4 assaulted Jagdishprasad. This benefit can be given to the accused so far as assault to Jagdishprasad is concerned. Moreover, the whole evidence of conspiracy and intention of accused no.2 from very beginning shows that his intention was to rob Jagdishprasad and not to kill. Even if it is taken that the accused have assaulted Jagdishprasad with sword, then looking to the evidence of Dilip Darawade that incident was taken place in a quick moment, therefore, in that hurried moment the accused must have assaulted Jagdishprasad since Jagdishprasad was not leaving the suit case (Art.41). Thus, it cannot be said that there was intention of the accused to kill Jagdishprasad but it can be said

that act of the accused was so rash that he must have inflicted the injury with sword not with the intention to kill Jagdishprasad and at that time the accused had no knowledge that if he will inflict injury on the person of Jagdishprasad, Jagdishprasad would die. Under the circumstances, I think, the act of accused inflicted the injury on Jagdishprasad does not come under the offence punishable under section 302 of the Indian Penal Code."

12. The aforesaid observations of the Trial Court are wrong and perverse. If the accused, while committing a robbery, inflict injuries due to which the victim dies, it cannot always be said that the injury inflicted was unintentional. We do not wish to enter into that controversy as the Trial Court has convicted the accused under Section 304 Part II read with 34 of the I.P.C. However, we express our disagreement with the findings recorded by the Trial Court.

13. As regards the submission made by the learned counsel for all the accused that they be shown some leniency while sentencing them, we agree with the submissions made by the learned counsel. Admittedly, accused no.1 was arrested on 26.1.1989, accused No.2 and accused no.3 were apprehended and arrested on 5.2.1989 while accused No.4 was arrested on 27.4.1989. They were all ordered to be

released on bail on 17.8.1989 when their respective appeals were admitted by this Court. All the accused have undergone imprisonment for about one and a half years. Almost 18 years have gone by since they committed the offence. We ascertained from the learned A.P.P. that the accused have no criminal antecedents and have not been involved in any crimes after the incident of 1989. In our view, no purpose would be served by incarcerating the accused any further especially since they have reformed. We, therefore, feel that the sentence imposed on the accused should be reduced to the terms of imprisonment that they have undergone and the fine imposed must be enhanced.

14. Appeal Nos. 531 of 1990, 491 of 1990 and 454 of 1990 filed by the accused are allowed partly. The conviction of the accused under Sections 394, 304 Part II r.w. 34 and 120B of the I.P.C. upheld. The sentence imposed on each of them by the Sessions Court is reduced to imprisonment for the terms that they have already undergone. The fine payable by each of the accused is enhanced to Rs.50,000. Accused are granted time of eight weeks to pay enhanced fine. If they fail to pay the enhanced fine, they will have to undergo sentence for a period of six months each. The appeals filed by State i.e. Appeal Nos. 580 of 1990 and 581 of 1990 are dismissed.

(SMT. NISHITA MHATRE, J.) (D.G. DESHPANDE, J.)